Book Reviews

Bouillabaisse

Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies. By Stanley Fish.* *Durham and London: Duke University Press*, 1989. Pp. x, 613. $37.50.

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Stanley Fish is a brilliant contributor to our debates about interpretation. He is also relentless. *Doing What Comes Naturally* must reprint every word he has written over the past decade: some twenty-two essays, amounting to a book of 613 pages. The volume is endlessly repetitious, since Fish stakes out the same territory in each of the domains he enters, and makes the same moves in besieging the various citadels he wants to capture. One might wish for an essence of Fish: a short book that would set forth the argument in its general form, then demonstrate the kind of application it has to the different fields under consideration. One must instead make do with this series of interventions in debates whose original terms are set by Fish's interlocutors, but which always return to the same point.

That point, over and over, is essentially this: that there is no foundation for interpretation that does not derive from the activity of interpretation itself. Since there are no independent grounds for interpretation, there is no escape from rhetoric, meaning the discourse of persuasion, the norms and constraints of which in every case are defined by one's membership in a given professional community of interpretation. The title *Doing What Comes Naturally* refers to what Fish in his Preface calls

> the unreflective actions that follow from being embedded in a context of practice. This kind of action—and in my argument there is no other—is anything but natural in the sense of proceeding indepen-

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> dently of historical and social formations; but once those formations are in place (and they always are), what you think to do will not be calculated in relation to a higher law or an overarching theory but will issue from you as naturally as breathing.[1]

Fish has of course for some time been working on the notion of "communities of interpretation," a dominant concept in his earlier *Is There a Text in this Class?* (1980). The concept logically derived from, and in some ways brilliantly resolved the uncertainties of, "reader-response criticism," which always faced the problem of constraint and consensus in interpretation. If meaning is no longer in the text but in the reader's response to the text, what is to discipline the most errant subjectivity, and to prevent interpretation from becoming a solipsistic enterprise? The interpretive community provides an answer, since members of that community discipline one another through shared norms of what is pertinent and what is not.

Those who were attracted to the notion of interpretive communities but were troubled by certain issues it raised—for instance, adjudication of the claims of competing communities, and the production of change within a consensual community—will find only the coldest of comforts in *Doing What Comes Naturally*. For here the concept of community has become so closed as to be claustrophobic—there is literally no way out from the community you happen to have got yourself embedded in—and "Change," so far as I can tell from the rather unsatisfactory essay with that title, has become the product of a mysterious negotiation among members of the community, who all the while continue to do what comes naturally. In the movement from *Is There a Text in this Class?* to *Doing What Comes Naturally*, two of the more disquieting elements of the earlier book have come to dominate in Fish's thinking: the apologia for professionalism, and the simple valorization of power as what, in the last analysis, determines meanings and the adjudication among competing interpretive claims.

Let me start with a relatively anodyne example that can help to characterize where Fish now stands: the essay "No Bias, No Merit," which concerns a shift in policy of *Publications of the Modern Language Association*, which decided to institute the practice of "blind submission," whereby the name of the author submitting an essay for publication is effaced before it enters the process of peer review. Fish's point is that an essay submitted by someone like Stanley Fish is different in status by the fact of its authorship than one submitted by Professor Unknown because the name "Stanley Fish" stands for a prior body of written material which gives him a certain professional identity and even authority. Since *Paradise Lost*, as we now know and read it, is in some measure a product of Stanley Fish's interpretive work on it, anything new that Stanley Fish

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1. S. FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES ix (1989) [hereinafter by page numbers].

says about *Paradise Lost* is necessarily of interest. To pretend that the same essay signed Stanley Fish and Professor Unknown is in no way different because of the signature is to take an ostrich's position in the politics of interpretation, which have to do not only with what arguments are advanced, but who is advancing them, from what position and on what grounds. The argument for "intrinsic merit" simply begs the questions of the grounds—professionally determined—that identify both of those terms. As Fish puts it, "merit, rather than being a quality that can be identified independently of professional or institutional conditions, is a product of those conditions."[2] This essay was written in 1979 (and never published); in a 1988 addition, Fish notes that the opposition to this position has shifted over the years, since a new generation in the academy began to argue that all merit depends on politics, on socio-economic power realities outside the profession, and must be analyzed as such. "In 1979 . . . ," writes Fish, "I was arguing for politics and against transcendence; now I am arguing for politics and against Politics (the new transcendence)."[3]

The argument of "No Bias, No Merit," reveals Fish at his best, in a remarkably lucid presentation of why one cannot perform valid acts of criticism by breaking free of a profession's norms and constraints, since the very conditions of intelligibility and authority are underwritten by professional norms and constraints. The argument is taken a step further in "Anti-Professionalism," where he expertly recuperates radical critiques of the professional ethos as part of the essential internal dynamics of professionalism:

> As we have seen again and again, anti-professionalism is by and large a protest against those aspects of professionalism that constitute a threat to individual freedom, true merit, genuine authority. It is therefore the strongest representation within the professional community of the ideals which give that community its (ideological) form. Far from being a stance taken at the margins or the periphery . . . anti-professionalism is the very center of the professional ethos, constituting by the very vigor of its opposition the true form of that which it opposes. Professionalism cannot do without anti-professionalism: it is the chief support and maintenance of the professional ideology; its presence is a continual assertion and sign of the purity of the profession's intentions.[4]

Thus Fish is able to take such contestations as Richard Ohmann's *English in America*[5] and the Critical Legal Studies movement, which see

2. P. 166.
3. P. 179.
4. Pp. 244-45.
5. R. OHMANN, ENGLISH IN AMERICA: A RADICAL VIEW OF THE PROFESSION (1976).

themselves as challenging the very assumptions and bases of professional business-as-usual, and show them to be a necessary part of the internal dialectics that set and revise the standards of the profession.

Fish's argument is unimpeachable so far as it goes, but it is also, I think, smug and trivializing. What is wrong with it is perhaps most of all its tone of self-satisfaction in demonstrating that even the most radical questionings of professionalism can be subsumed within professionalism. For the critique of professionalism generally takes the form of a warning that exclusive dedication to professional concerns—more and more writing on ever smaller subjects, hyperspecialization, a proliferation of disciplinary busy work, the promotion of careerism—can blind one to the large questions of why one needed the profession in the first place. The study of literature, for instance, needs to remind itself periodically—in fact, incessantly—that literature is a human activity, a reformulation of the world that serves human needs. The profession does not of itself provide a context that fosters and distinguishes work that is of more than routine interest; much truly significant work is in fact transgressive of professional norms, and cannot be absorbed until these change. Fish would of course claim that such transgressions are recuperable to the professional constraints that make them possible in the first place. But that claim can be urged only on a weak and trivial conception of transgression, which in Fish's logic is always already recuperated: "[C]onstraints are not something one can either embrace or throw off because they are constitutive of the self and of its possible actions."[6]

We may begin to suspect that the ways in which Fish is right depend on a weakened sense of that which stands in opposition to his position, and ultimately, as I shall suggest, a somewhat trivialized notion of what constitutes that "self." Consider his arguments concerning the status of "theory," which has of course been a deity much worshipped of late in many fields. Fish's main point is that "theory has no consequences."[7] It has no consequences because theory will never provide an "outside" of practice that would allow one to ground practice, to establish, independently of the practice, its principles and rules. Doing theory is in fact a form of practice, what Fish chooses to call "theory-talk": a kind of discourse that clearly has a value in debate, and is indeed currently a kind of requirement of debate, but has no transcendent position in relation to the professional context which has set the terms of the debate. Now, for Fish to be right about the inconsequentiality of theory depends, as he acknowledges, on a restricted definition of theory:

> I reserve that word for an abstract or algorithmic formulation that

6. P. 27.
7. P. 14.

> guides or governs practice from a position outside any particular conception of practice. A theory, in short, is something a practitioner consults when he wishes to perform correctly, with the term "correctly" here understood as meaning independently of his preconceptions, biases, or personal preferences. To be sure, the word "theory" is often used in other, looser ways, to designate high-order generalizations, or strong declarations of basic beliefs, or programmatic statements of political or economic agendas, or descriptions of underlying assumptions. . . . When I assert the lack of a relationship between theory and practice I refer to the kind of relationship (of precedence and priority) implied by the strongest notion of theory; the relationships that *do* exist between theory and practice (and there are many) are no different from the relationships between any form of talk and the practice of which it is a component.[8]

In other words, the assertion of the inconsequentiality of theory derives from a definition of theory that gives it the status of theory in the sciences, which in turn makes everything that goes by the name of theory in the interpretive disciplines something else. This strikes me as both true and trivial, and as not very helpful.

Our usual sense of "theory"—in literature and in law, for instance—is a higher-order generalization which derives from a reflection on the general principles guiding practice, and then in turn feeds back into practice. Theory is an explicitation of practice, and a model of understanding. As such it is useful, even necessary, since, as Roland Barthes pointed out long ago, even when you don't think you have a theory (when you think you are simply doing what comes naturally), you do have an unacknowledged one: theory as an ideology.[9] Barthes went on, in his Inaugural Lecture at the Collège de France, to renounce any attempt to find a "metalanguage," thus liquidating the "high structuralist" search, during the 1960's and 1970's, for universals of linguistic and literary analysis and recognizing his passage to "post-structuralism." But the recognition that there is no foundational theory in the human sciences—the renunciation of the dream of a place outside from which to gain leverage on language—did not entail for Barthes, and need not entail for anyone, the claim that theory is without consequences. It rather imposes a more tentative, dialectical, even playful role on theory as a reconfiguration of practice.

Here, as so often elsewhere, Fish is so anxious to make a flamboyant claim, to stake out a striking position, that he is forced to reduce the concepts at issue to rigid and narrow versions of themselves, with the result that while his formulations are undoubtedly true so far as they go, they don't go very far: the big bang ends in something of a whimper. Fish of course has seen round this corner far enough to grant the point. Consider,

8. P. 378.
9. R. BARTHES, CRITIQUE ET VÉRITÉ (1966).

for instance, his crucial argument concerning the relation of principle to force, of rules and laws to personal preferences. "Does might make right?" he asks, to reply: "In a sense the answer I must give is yes, since in the absence of a perspective independent of interpretation some interpretive perspective will always rule by virtue of its having won out over its competitors."[10] In the ensuing argument, principles and preferences are shown to be the same thing, with the former merely preferences that have gained, for the moment, the force of authority. "It is in this sense," Fish continues,

> that force is the sole determinant of outcomes, but the sting is removed from this conclusion when force is understood not as "pure" or "mere" force (phenomena never encountered) but as the urging (perhaps in the softest terms) of some point of view, of some vision of the world complete with purposes, goals, standards, reasons—in short, with everything to which force is usually opposed in the name of principle.[11]

If he here offers an effective demonstration of why foundationalist thinking can always be undermined by the anti-foundationalist critique, his conclusion is so unexceptional that one need no longer fear that Fish is a sting-ray. Force has become simply the force of reasoned persuasion.

To be sure, to put everything on the basis of persuasion—that is, of rhetoric—does have far-reaching implications, if not so much for theory itself as it has been understood in the human sciences, certainly for the practice of law. Law would seem to be a profession and form of thought that needs to lay claim to a theory of justice and its derivable principles if it is not to be simply the exercise of force: the rule of "the gun at the head." In a series of essays, most of them already celebrated or notorious, Fish takes on such legal thinkers as Ronald Dworkin, Owen Fiss, Richard Posner, and H.L.A. Hart. Among the vexed issues that he addresses is the problem of intentions, which he nicely stands on its head. To Dworkin's argument—familiar to generations of literary scholars—that interpretation can proceed as the construing of sense and need not and should not depend on the identification of authorial intention, Fish replies that it is impossible to interpret without postulating intention. Assumptions about the intention of statements are simply part of the act of interpretation, since we assume that statements are made with purposes, with claims on meaning and conviction. Fish freely concedes that such an account of intention renders it "methodologically useless. One cannot use it (as some intentionalist critics want to) as a constraint on or key to interpretation because it is not distinguishable from that which it would con-

10. P. 10.
11. P. 12.

strain."[12] Now, Fish's account of the status of intentions in interpretation seems to me correct, and indeed the only account viable in textual interpretation. But it doesn't really address the kind of intentionalist argument in legal studies that concerns Dworkin. When Posner, for instance (or Robert Bork), argues a constitutional interpretation from intention, that intention is not textually derived or derivable. It is considered to be pretextual (though it may be derived from other texts, such as the *Federalist Papers* or the ratification debates) and thus to offer an independent entity that can be compared to meanings construable from the written text. One can think such an intentionalism misguided, as I do, but you will not be able to argue with its proponents on the basis of Fish's view. You are better off with Dworkin's attempt to insulate interpretation from intentionalism.

Fish's argument with legal theory finds its most acute and definitive form in the essay on H.L.A. Hart's *The Concept of Law*.[13] Here, it is relatively easy for Fish to show that Hart's distinction between a "core of settled meaning" and a "penumbra" of uncertainty and doubt is in fact a product of the interpretive activity which it claims to guide by the fixing of rules and limits (that which is not open to doubt in interpretation). "While the distinction between core and penumbra can always be made at a particular moment, at another moment the *interpretive* conditions within which the distinction is perspicuous can be challenged and dislodged."[14] Fish compares the search for this "settled core" of meaning to the idea that language can have a literal meaning separable from its rhetoricity, and to the argument—urged in various guises by Stephen Toulmin and Wayne Booth as well as Hart and other jurisprudential thinkers—that one can be skeptical about one's own beliefs, discount one's own prejudices. Fish's response is to claim that we can never divest ourselves of ideological convictions, that "reason and belief" are in fact identical, that "you can never get away from your beliefs, which means that you can never get away from force, from the pressure exerted by a practical, non-neutral, nonauthoritative, ungrounded point of view."[15] Once again, the very conditions of reason turn out to be consubstantial with premises that are assumptions, beliefs. This leads Fish to some flashy formulations: "[T]he force of the law is always and already indistinguishable from the forces it would oppose. Or to put the matter another way: *There is always a gun at your head.*"[16] That gun can be an internalized conception as much as an external coercion, which leads to Fish's next aphorism: *[T]he*

12. P. 117.
13. H.L.A. HART, THE CONCEPT OF LAW (1961).
14. P. 512.
15. P. 519.
16. P. 520.

gun at your head is your head."[17] Force, in this sense, becomes *interest aggressively pursued"*[18]: one's marshalling of arguments in favor of a "complex of goals and purposes, underwritten by a vision, and put into operation by a detailed agenda."[19]

What is wrong with the argument is not its logic—which seems to me unassailable on its own terms—but its ultimately trivial view of mind, or psyche, and its relation to the notion of law. If you want to equate reason and belief, then you need to pursue a more probing argument about the nature of beliefs, including the belief in justice and rules. Such an analysis might lead you to the conclusion that a belief in justice is merely the creation of Nietzschean *ressentiment*, or perhaps a byproduct of the Oedipal conflict, the emergence of the "Name of the Father" from the interdiction of incest as the fundamental rule. But wherever you seek the source of the notion of law, you must recognize it as a fundamental category of thought of all known human societies. Thus to identify it simply as a product of ideology, as that gun at one's head that is one's head, is to fail to analyze the head and how what's there got there. Fish is strangely uninterested in the problem he keeps throwing up: the problem of belief, of ideology, ultimately cognitive and ethical problems of mind. One has the impression that mind, in so far as he takes notice of it, is merely the repository of professional determinations.

Fish fails, here and elsewhere, to recognize that interpretation involves not only epistemological problems but also ethical ones. Choices have to be made about beliefs and actions, and also about interpretation, and these choices are often essentially moral in nature. As Dworkin urges, moral propositions can be debated only in moral arguments. Anti-foundationalism or relativism may themselves be ethically necessary positions, but they do not excuse one from making further choices within a given practice. Fish's view of choice as simply "preference," determined by one's professional context, severs him from any concern with the ethics of interpretation.

This problem becomes acutely visible in the final essay of *Doing What Comes Naturally*, where Fish, having slain all the other monsters in his path, goes to his encounter with the Sphinx—or perhaps with Laius the father—in the person of Freud. In his commentary on that much-commented-upon text, Freud's case-history of the Wolf-Man,[20] Fish claims that Freud is engaged in a rhetorical power-play, beating his patient—and his reader—into submission. Freud's elaborate reconstruction

17. P. 520.

18. P. 521.

19. Pp. 521-22.

20. S. FREUD, *From the History of an Infantile Neurosis (1918)*, in 17 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 3 (J. Strachey ed. 1974) [hereinafter THE STANDARD EDITION].

of the Wolf-Man's "primal scene"—witnessing his parents' copulation—is really about the "discursive power of which and by which it has been constructed."[21] That is, the unfolding of the Wolf-Man's story really mimics Freud's own persuasive rhetoric. Freud finds what he needs, and orders it in a dramatic presentation of unfolding, in a narrative that has no other basis than its need to persuade. Fish renews here—without any apparent awareness of his predecessors—a traditional attack on psychoanalysis: that it is really "suggestion," that everything the psychoanalyst finds is what he has put into his patient's head. Fish also displays a lack of awareness of Freud's own acute awareness of this problem, best expressed in some of the late essays, such as "Constructions in Analysis," which begins with Freud's recognition that psychoanalysis is often held to be the art of "Heads I win, tails you lose."[22] Psychoanalysis can be so characterized because of its peculiar treatment of "yes" and "no" in its subjects, where the latter may be the equivalent of the former, the sign of repression and resistance. Freud in "Constructions in Analysis" undertakes a discussion of the status of "yes" and "no" in psychoanalytic work, a discussion that of course turns on unconscious mental processes and their representation in discourse.

Fish derives from the Wolf-Man case-history many of the principles of analytic narrative construction that Freud examines in "Constructions in Analysis," while claiming Freud's blindness to them. Essentially, psychoanalysis may work by constructing narratives of the past that have no demonstrable basis in reality other than this ability to convince the patients that they must be true. In other words, the proof-test of psychoanalytic narratives does not necessarily reside in their capacity to revive clear memories of the past, but rather in the force of the conviction they carry: the way in which they appear to the patient to make sense of his or her life, to bring the past story of unconscious desire to bear on the present discourse. In this sense, Fish is quite correct to say that "the assumption of the primal scene proves itself by its effects, by its ability to bring order to an apparently heterogeneous mass of fragments and impressions."[23] Freud's notions of causality and connection in the psychoanalytic narrative became more and more complicated as he pursued his work: Simple chronology was put into question by the workings of deferred action or retroaction; the part played by event and by phantasy became more difficult, even impossible, to unravel; the dynamic interaction of the transference meant that the analyst was working in an uncertain realm of present revivals of past affects. The only "proof" of the successful narrative came to lie in its effects, in its ability to order, explain, and eventually, to cure.

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21. P. 547.

22. S. FREUD, *Constructions in Analysis (1937)*, in 23 THE STANDARD EDITION, *supra* note 20, at 257.

23. P. 546.

Fish can write off the Wolf-Man as a rhetorical power play because he believes neither in the unconscious nor in cure. For Fish, "the unconscious is not a concept but a rhetorical device, a placeholder which can be given whatever shape the polemical moment requires,"[24] by which I suppose that he means that one can never prove the existence of the unconscious; indeed, one can only know it through its effects, which is what it is designed to explain. To say this is to repeat the standard anti-foundationalist gesture: to claim that one can never prove the basis that one uses for one's proofs. True enough, but once one has made that clever pirouette, shouldn't the real work begin—in this instance, an argument about what belief in the unconscious might mean, what it may explain, what superior picture it may give (if it does give) of what we know about the operations of human mind and behavior? Not much seems to be at stake in psychoanalysis for Fish: in his argument about Freud's "scene of persuasion," the patient disappears, leaving only the reader. The idea that persuasion might work on and for the patient because the constructed psychoanalytic narrative does make sense of the buried history of unconscious desire, and thus does bring some clarity to an otherwise muddled life, simply doesn't occur to him. Psychoanalysis has become purely a field for literary critics.

Fish proposes as an epigraph to his essay:

> a report by the Wolf-Man of what he thought to himself shortly after he met Freud for the first time: "this man is a Jewish swindler, he wants to use me from behind and shit on my head." This paper is dedicated to the proposition that the Wolf-Man got it right.[25]

I confess to find this both sad and symptomatic as an epigraph to the final essay of *Doing What Comes Naturally*. Fish's rhetorical analysis of the case-history is characteristically brilliant, and ultimately trivial, in that it refuses to debate the very questions that have made psychoanalysis a central controversy of Western thought since its inception. At very least, Fish might have recognized that psychoanalysis is one field that claims to have a theory of the origin of the notion of law—indeed, of Law—as a kind of absolute in psychic and social life. The Oedipus complex may not be provable, and it is no doubt historically contingent, but that doesn't mean that it lacks explanatory value. It certainly provides a working hypothesis of how humans function that is superior to Fish's "the gun at your head is your head," for it roots the construction of that "gun" in lived processes of everyone's maturation. Fish is simply too good and too valuable a critic for us to be happy to see him circumscribe himself in such facile rhetorical maneuvers. Yes, everything is rhetorical. Yes, correct interpretations are

24. P. 534.
25. P. 526.

determined by power of, and power within, interpretive communities. But granted all this, there are still choices to be made within the fallen world. After finishing *Doing What Comes Naturally*, we may want to respond in the manner of a psychoanalyst—not the one who listened to the Wolf-Man, but rather the one who has just finished hearing Portnoy's complaint: "Now vee may perhaps to begin. Yes?"

The Female Body and the Law: On Truth and Lies

The Female Body and the Law. By Zillah R. Eisenstein.* *Berkeley: University of California Press*, 1988. Pp. ix, 235. $25.00.

Ruth Colker†

As a professor, I look for books or articles to assign to my students that are both informative and well-written. Unfortunately, some of the work that I think captures the essence of critical theory is quite difficult to comprehend.[1] It is therefore refreshing to find work which represents a critical perspective and works well in the classroom. Zillah Eisenstein's most recent book, *The Female Body and the Law*,[2] is such a work, and I would recommend it highly to feminists and critical scholars for use in the classroom.

Unlike many of the writers in feminist jurisprudence, Eisenstein comes to her enterprise with a background in political science. She has been a prolific writer in the area of feminist theory, having written books such as *The Radical Future of Liberal Feminism*[3] and *Feminism and Sexual Equality: Crisis in Liberal America*,[4] as well as having edited *Capitalist Patriarchy and the Case for Socialist Feminism*.[5] As her writing and thinking have matured, she has made substantial contributions to our understanding of a wide variety of feminist perspectives, ranging from liberal

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† Professor of Law, Tulane University; Visiting Professor of Law, University of Toronto (spring 1990). I would like to thank John Stick and Joan Williams for their helpful comments on a draft of this essay. Joan and I have agreed to disagree about some aspects of Eisenstein's book, and I suggest that the reader read her review of Eisenstein's book which will appear in the *Michigan Law Review*'s annual survey of books relating to the law. Williams, *Feminism & Post-Structuralism: Zillah Eisenstein, The Female Body and the Law*, 88 MICH. L. REV. (forthcoming 1990).

1. The works of Roberto Unger, Michel Foucault, Jacques Derrida, Jacques Lacan, and Julia Kristeva come to mind. Some of the difficulty may be attributable to problems of translation, as I have read much of this work in translation from French. *See, e.g.*, J. KRISTEVA, THE KRISTEVA READER (T. Moi ed. 1986); J. KRISTEVA, ABOUT CHINESE WOMEN (1986); R. UNGER, PASSION: AN ESSAY ON PERSONALITY (1984).

2. Z. EISENSTEIN, THE FEMALE BODY AND THE LAW (1988) [hereinafter cited by page number only].

3. Z. EISENSTEIN, THE RADICAL FUTURE OF LIBERAL FEMINISM (1981) (arguing that liberal feminism is inherently radical and is not pure liberalism).

4. Z. EISENSTEIN, FEMINISM AND SEXUAL EQUALITY: CRISIS IN LIBERAL AMERICA (1984) (discussing weakness of liberal theory as applied to feminist issues of equality).

5. CAPITALIST PATRIARCHY AND THE CASE FOR SOCIALIST FEMINISM (Z. Eisenstein ed. 1979) (anthology of writings on socialist feminism).

feminism to socialist feminism. Rather than emphasizing the differences among the different feminist perspectives and arguing that only one perspective represents the "true" feminist perspective, she has served an accommodating role in the feminist movement by emphasizing the similarity of various feminist perspectives and the lack of a need to choose among competing theoretical perspectives.[6]

Eisenstein's latest book, *The Female Body and the Law*, is her finest yet. She tries to offer insight into an alternative way to view the legal significance of the female body, getting us out of the trap of adopting either the "special treatment" or "equal treatment" perspective. In addition, drawing on her earlier work on liberal feminism,[7] she tries to show how we, as feminists, do not have to discard liberal theory entirely in order to maintain a radical feminist perspective. Finally, she offers some clarity on the difficult issue of how to determine "truth." She says that we should recognize that the world contains multiple and ever-changing truths about any particular issue. Thus, she concludes, we should choose our positions on issues with openness and honesty, recognizing that any position must be open to revision as political-social circumstances change.

As I will discuss, Eisenstein's work has given me fresh insight on how to think about the pregnancy cases—to consider how to describe with certainty and clarity that it is sex-based discrimination when an employer fails to provide pregnancy-related disability or health care benefits. Nevertheless, there are two conclusions in her work which I find troubling.

First, Eisenstein seems to conclude that feminist theory cannot accommodate the possibility that there are *any* objective truths. I will argue that that statement is implausible logically, but more importantly, it is a wrong account of the possibilities underlying feminist theory. Feminist theory necessarily presumes that there is an objective set of ethics within society upon which feminists can rely in seeking to change the material conditions of women's lives.

Second, Eisenstein seems to conclude that we can avoid difficult theoretical choices in dealing with particular problems—that we do not, for example, have to choose between special treatment or equal treatment perspectives in the pregnancy context or that we do not have to choose between privacy and equality perspectives in the abortion context. Although I think that Eisenstein has offered an important insight—that we do not have to choose consistent theoretical positions across all issues and across all historical moments—I think she has overstated her claim. As I

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6. This approach puts her in sharp contrast to Catharine MacKinnon, who consistently argues that radical feminism is the only "true" feminism. *See* C. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 137 (1987). It also places her in contrast to Alison Jaggar, who purports to survey feminist theory but actually is trying to convince the reader of the merits of a socialist-feminist perspective. *See* A. JAGGAR, FEMINIST POLITICS AND HUMAN NATURE (1983).

7. *See* Z. EISENSTEIN, *supra* note 3.

will try to show through the use of particular examples, it is often important to struggle with difficult theoretical choices on particular issues; our failure to do so may make us less politically effective. I will suggest that we cannot always reduce the tension between opposing feminist positions by searching for middle grounds; instead, we can reduce the tension by making difficult choices in particular historical circumstances but articulating, as we make these choices, that the opposing perspectives represent important values and that our choices must be constantly open to reexamination. Eisenstein's observation that we should define truth with openness should be receptive to such a claim.

In this essay, I will first discuss Eisenstein's claims about truth and reality. Second, I will discuss Eisenstein's application of her general perspective on truth to how legal scholars and practitioners should think about the female body. Finally, I will discuss how feminists *should* apply their understanding of truth and reality to feminist argumentation.

I. On Truth and Reality

Relying on a critical perspective, Eisenstein adopts a vision of reality that "is neither subjective nor objective."[8] Reality is a series of discourses, meanings are open rather than closed, and the truth may have multiple and shifting meanings. Truth is part of a discourse about power and specific historical relations. There is no place outside discourse; even the term "discourse" exists *within* a theory of knowledge and power that gives it its meaning at a particular time. Rather than talk about "the truth" as a static, pre-social entity, Eisenstein urges us to talk about multiple, shifting *truths* that reflect our present historical circumstances.

One common criticism that is made of this perspective is that it leaves us hopelessly relativistic, because we cannot make any assessment about what is better or worse in society. Eisenstein rejects such a criticism:

> It is only within a standpoint that privileges objectivity and absolutes that relativism and pluralism present a problem. Plurality does not mean that all truths are equal; it merely uncovers the role of power in defining truth. Once truth has been defined, we are free to argue in behalf of our interpretation, but we cannot use the claim to truth itself as our defense. Although I assume that knowledge (and truth) is plural, I do not allow this assumption to keep me from arguing that society must be organized around a notion of sex equality that recognizes the specificity of the pregnant body from a standpoint of radical pluralism. The assumption of plurality does, though, keep me from bringing closure to the meaning of the pregnant body in

8. P. 22.

> terms of the meaning of sameness or difference or equality. We must leave meanings open at the same time that we act on them.[9]

Thus, truths are not "objective" because transhistorical, fixed, unitary, statements are impossible.

Eisenstein then applies her perspective to how the law should consider the female body or, more generally, how we should think about sex differences. The significance of the body, like all truth, cannot stand outside society, history, and language. It, too, must be open to multiple and changing meanings. Eisenstein argues that we must view "the body as a capacity rather than a static entity. . . ."[10]

In one of her central attempts to avoid dichotomous thinking, Eisenstein mentions that we must not adopt the "unity" perspective or the "diversity" perspective in thinking about the body. She says that "we must recognize both the unity—the concept of the 'body'—and the diversity—actual bodies—as they exist."[11]

Eisenstein's argument at this point is difficult to understand. She is not saying that we should stop talking about sex differences. Instead, she is trying to adopt a way to talk about sex differences that uses her "radical pluralist methodology."[12] Under this perspective, she tries not to overstate homogeneity or heterogeneity. For example, she concludes: "We must therefore seek the unities as well as the diversity in difference(s). We need to examine and understand 'different similarities' and 'similar differences.' "[13] She argues for a method that "takes *both* specificity and unity (meaning homogeneity) as its starting point."[14]

As I will discuss later, I do find her approach helpful in thinking about the female body and pregnancy cases. Nevertheless, I think her claims about truth have fundamental problems which are commonplace within feminist theory and are therefore worthy of some attention.

Eisenstein says that there is no transhistorical, fixed, singular truth which could be called "objective." Instead there are multiple truths which we have created through discourse.[15] On the level of pure logic,[16] it is easy to see that Eisenstein's claim cannot be accurate. In making that statement, she is asserting a transhistorical, fixed truth: There is no objectivity.

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9. Pp. 23-24.
10. P. 29.
11. P. 31.
12. P. 35.
13. *Id.*
14. P. 36 (emphasis in original).
15. P. 22.
16. If this were *only* a logical problem, then I might not discuss it. However, I find that this kind of statement impedes my ability to read feminist theory. If there are no truths, then I wonder why I should read a book filled with the asserted truths of another feminist. Of course, I must persist and read because I realize that we are all engaged in a search for truths, despite such disclaimers.

The statement is circular; if her assertion is accurate then her statement is wrong.

One way to preserve Eisenstein's observation is to modify it to mean that there is no transhistorical, fixed truth other than the statement that there is no truth.[17] That, at least, is a more workable statement that deserves some response.[18]

Even if I reformulate Eisenstein's perspective in that way, I do not find it plausible. As I will discuss below, feminist theory needs to rely on the possibility of multiple objective truths—one of which is *not* the belief that there are no objective truths. Before turning to why I believe such objective truths are necessary, I will discuss the response to the apparent illogic in her position that Eisenstein does provide.

Eisenstein attempts to counter critiques such as mine by relying on a distinction offered by Linda Gordon: Although there is no objective truth, there are objective lies.[19] Furthermore, Gordon suggests that while some history is more accurate than other types of history, no history qualifies as objectively true.[20]

Gordon's work, however, does not get us out of the problem that I have identified with Eisenstein's position. To state that "something is wrong" (an assertion of an objective lie) is to assert a truth. It is a truth about what is a lie. An example may help. A non-feminist might say, "Women are not subordinated." I suspect that Linda Gordon and Zillah Eisenstein would say that this statement is wrong—it is an objective lie. Why is this statement wrong? Because we believe that women are subordinated—an objective truth. Our ability to dispute an objective lie also enables us to assert an objective truth, yet Eisenstein denies our ability to come to common understandings concerning objective truths because our perspectives are necessarily subjective.

I would argue that Gordon's statement is wrong because there are both objective lies *and* objective truths. In fact, the existence of both phenomena is essential to feminist theory. Thus, my response to Eisenstein's (reformulated) claim and my response to her use of Gordon's statements are

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17. *But see* S. FISH, DOING WHAT COMES NATURALLY 29 (1989) (arguing that relativistic theory of truth is not contradictory; relativism does not claim "that there are no foundations, but that whatever foundations there are . . . have been established by persuasion").

18. Alternatively, Eisenstein does not mean to make the claim that there are no objective truths. Sophisticated critical analyses apparently do not make that claim. *See* Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429, 488–95 (1987) (discussing "law as indeterminate" critiques made at various levels of sophistication). Instead, she may be trying to state that legal scholars and others may have overstated our ability to discern objective truth. Much of what has been called objective truth is, on closer examination, not objective truth. There is nothing in Eisenstein's text that would lead me to believe that this is her basic claim. Nevertheless, I acknowledge that other critical scholars make this more sophisticated claim, with which I have no disagreement.

19. P. 23 (quoting Gordon, *What's New in Women's History?*, in FEMINIST STUDIES, CRITICAL STUDIES 22 (T. de Lauretis ed. 1986)).

20. *Id.*

really the same. Both positions are untenable because they claim that there are no objective truths, thereby overlooking the various ways in which feminist theory needs to rely on objective truths.

In order to make my argument about objectivity clearer, I need to offer a distinction between feminist arguments that are (1) a description of reality or (2) a critique of that reality based on a set of ethics. As a legal-political movement, feminist theory needs a way to explain how we can hope to use the courts to improve women's condition in society. That strategy requires us to believe that there is a language and a set of ethics upon which we can rely to improve the conditions of this society. I would suggest that feminism is successful when it is able to ground its claims on universally-held ethics that are an "objective" part of our reality. If those ethics do not exist, then feminism cannot hope to be successful.

I will now translate this observation into the distinction that I have offered above. Reality, as it is presently constituted, cannot be objective because it must be historically specific rather than transhistorical. We can only describe reality from a particular perspective, such as from that of the condition of a woman, making it difficult for a description of reality to be universally shared. Thus, I agree with Eisenstein and other feminists who say that descriptions of reality cannot be objective.

Nevertheless, we need to be careful not to overstate how much the fact that descriptions of reality are not objective impedes our ability as feminists to move forward politically. Our disagreements with non-feminists, especially those who are women, are not always disagreements over descriptions of reality. For example, Phyllis Schlafly and Catharine MacKinnon might describe reality as containing the same material conditions, such as women's economic dependency on men within marriage.[21] Although I would expect that other non-feminists (especially male non-feminists) would not be willing to concede that women are economically dependent on men within marriage, that is not the point of disagreement between Schlafly and MacKinnon. Schlafly and MacKinnon disagree about feminism despite the fact that they may describe the world similarly. Whether descriptions of reality are objective or subjective, therefore, does not necessarily have implications for understanding our disagreements with non-feminists.

The disagreement between Schlafly and MacKinnon emerges at the second step in my distinction—at the step of critique. Schlafly would call life conditions fulfilling or satisfying which MacKinnon would label subordinating.[22] The disagreement between MacKinnon and Schlafly, as we

21. *See* C. MACKINNON, *supra* note 6, at 21–31 (debate with Phyllis Schlafly).

22. As MacKinnon noted:

> She [Schlafly] and I see a similar world, but we portray it differently. We see similar facts but have very different explanations and evaluations of those facts.
>
> We both see substantial differences between the situations of women and of men. She

move from step one—description of reality—to step two—critique—involves a difference in ethics.

The goal of feminist theory, I would suggest, is to convince people that the agreed-upon description of reality is *wrong*—that it has the name of subordination. It is at this point that I would argue that feminist theory necessarily must turn to a set of objective ethics or aspirations in order to be successful. Only by showing how this present reality stands in conflict with our agreed-upon ethical standards (i.e., a sense of "justice") can we convince society that that reality is wrong. If no such ethical standards exist, then feminist arguments concerning perspective and power would swing endlessly back and forth. In order to move forward in a lasting way, it would seem necessary for feminist theory to be able to rely upon a universal set of ethical standards.

Let me turn to another example to clarify this argument. The Federalist Society at Tulane Law School recently invited me to debate John Baker, a Professor at Louisiana State University, on the topic of abortion.[23] Baker's position was that Louisiana should reinstate its 1855 anti-abortion statute, which made it a criminal offense with a penalty of up to ten years at hard labor for individuals who assist a woman in procuring an abortion.[24] The statute contained only one exception—when the woman's life was at risk by continuing the pregnancy.

The initial question that I ask myself in preparing my talk is: What do I think I could say that would possibly move some members of the audience to my position? I realize that my description of reality is probably different than that of many members of the audience. I try to think about abortion from the perspective of the most disadvantaged women in our society—poor, young women who face an unwanted pregnancy and who do not have the financial resources to afford good prenatal care or offer a newborn an adequate home. I realize that these women, like all women, face unacceptable contraceptive options since no form of contraception that women can use is safe and effective. I also wonder about the life conditions that cause these women to face an unwanted pregnancy, because it does not seem plausible to me that any woman would engage in sexual intercourse in order to face an unwanted pregnancy. I also realize that if

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> interprets the distinctions as natural or individual. I see them as fundamentally social. She sees them as inevitable or just—or perhaps inevitable *therefore* just—either as good and to be accepted or as individually overcomeable with enough will and application. I see women's situation as unjust, contingent, and imposed.

Id. at 21.

23. The debate was labelled a "discussion" at my request and occurred on October 11, 1989.

24. LA. REV. STAT. ANN. § 14:87 (West 1986) (declared unconstitutional in Weeks v. Connick, No. 73-469 (E.D. La. Jan. 26, 1976) and its enforcement enjoined in *Weeks*, No. 73-469 (E.D. La. Feb. 20, 1976)). A motion by Orleans Parish District Attorney Harry Connick to reinstate the statute in light of Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989), was denied on January 20, 1990. *See* Motion Under Federal Rule 60 (B)(5) to Dissolve the Court's Injunction Against Enforcement of L.A. R.S. 14:87, 87.4 and 88, *Weeks*, 73-469; The Wash. Post, July 11, 1989, at A14.

these women choose to take an unwanted pregnancy to term and place the child for adoption, they would have to live with the knowledge that the child may face a lifetime of living in adoption agencies and foster homes, especially if that child is a member of a racial minority group or handicapped. Although this is the world I see, it may not be the world of which people in my audience are aware. Thus, my first step is to describe reality from my perspective and hope that I can expand the knowledge of my audience to encompass multiple perspectives.

Even if I can expand the perspective on reality of my audience, however, I realize that this expansion may not help me to succeed in the debate. I still need a vehicle through which I can convince others that the imposition of the Louisiana criminal statute would be *wrong*. At this stage, I try to speak from what I perceive to be the universal ethics that are present in that room. The ethic that I rely on is equal respect. I ask the question whether a society or legislature that respects women's well-being could respond to women's life conditions with a statement like that of the Louisiana legislature. I argue that a society that is anti-abortion because of the value it places on potential life should also respect the well-being of adult women who find themselves facing an unwanted pregnancy. Such a society, I argue, would have to first attempt to change the material conditions which cause women to face unwanted pregnancies. Such material conditions include unsafe and unacceptable contraceptive options as well as coercive, male sexual behavior. A respectful society, I argue, would not place all of the burdens on women and none of the burdens on men. A respectful society would try to make men at least as responsible as women in making informed reproductive decisions. The present regime gives women no societal support during or after their pregnancy through pre-natal care, child care, paid maternity leave, etc., and then tries to impose on women the sanction of the criminal law when they cannot meet the substantial responsibilities of pregnancy; this regime, I argue, is extremely disrespectful to women. Through such an ethical framework, I would hope to reach some of the anti-abortion advocates in the room.

Was my argument successful? I did not poll the audience so I cannot offer an empirical response. However, I can observe that many people came up to me afterwards and said that they considered themselves to be "pro-life" yet they were moved by what I had said and found that they now had to re-think their positions on the Louisiana legislation. Interestingly, some of those people were women of color who may have been able to agree with my description of reality and then could see the strength of my ethical argument. Thus, even I agree that the fact that there are universally-held ethics does not make our task as feminists easy. We still must face enormous disputes with others over our perspectives on an ever-changing reality. But, by recognizing that there are universally shared

ethics present in the room, we can hope to find a voice with which to speak to an audience.

If I am correct that there are some objective truths, the question becomes one of establishing those truths. Elsewhere, I have argued that feminists need to develop a system of ethics that has applicability to law.[25] The ethics that I have suggested—love, compassion, and wisdom—are ones that I think are shared by most major religious traditions and by a broad range of the political spectrum. These ethics can be the foundation for law because of their universal applicability. Such ethics are, in a sense, objective truths about our aspirations for society. If we truly share these ethics, then we might be able to establish that women are subordinated and that subordination is wrong.

When I have tried to present such a theory of knowledge and consciousness, I have been accused by feminists of being an "essentialist"—one who assumes that humans have innate characteristics—and of not understanding that individuals are socially constructed.[26] I think my critics are wrong. The recognition that we are socially constructed leads to the further recognition that we are constructed to share language and certain values with others. It actually makes more sense to assume that there are shared truths in a socially constructed world than in an essentialist world.[27] Our task politically is to discover which of those shared truths can be used as a basis for constructing yet a better world. We do *not* need to look to nature or biology for the source of our feminist values. By applying those values that already exist more universally in society, we can move society in a feminist direction.

If I am correct that we can gain control over our social construction in order to move it in the direction that will further our own well-being, the methodological question is how to sort out the good moves from the bad. The fact that we are socially constructed means that we are constructed to perpetuate our own oppression. It is therefore quite a challenge to break out of that set of shared truths and move towards truths that might benefit our well-being. I would hope that radical feminists would begin to tell us how they know the "truths" of which they speak so that we can begin to evaluate what processes may lead to the discovery of such "truths."[28]

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25. *See* Colker, *Feminism, Theology, and Abortion: Toward Love, Consciousness and Wisdom*, 77 CALIF. L. REV. 1014 (1989).

26. Such comments were made to me when I presented my work at the University of Wisconsin Feminist Legal Theory Institute as well as in personal correspondence from various feminists, such as Alison Jaggar. In general, I do not think that Eisenstein and other feminist scholars have appropriately examined the ways that contemporary liberal legal scholars make claims about objectivity. For an excellent discussion of the ways that critical scholars often misunderstand liberal claims about objectivity, see Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332, 371 (1986) (arguing that claim to "group objectivity," i.e., conformity to norms of justification, is "unexceptional empirical claim true of many discourses").

27. I thank John Stick for helping me with this idea.

28. I have tried to share my own processes in discerning truth with readers by discussing the

Our ability to discern a few truths in a cautious manner should be compatible with Eisenstein's perspective. For example, in discussing the importance of embracing both specificity and unity, she says that such an approach allows us to "focus in between the poles . . . ."[29] She is trying to move beyond bipolar thinking and help us to find a way to embrace both specificity and unity (or difference and sameness). My approach simply widens her embrace. I am suggesting that there is a second scale—between relativism and objectivity. Rather than embrace relativism, I am suggesting that we seek a minimalism which respects specificity and unity while also seeking, in some cases, to embrace an objective truth that is open to revision. Thus, we can say that law is wrong in the way that it has tried to apply the concept of equal respect to women in general, while also saying that at this time we have not reached a consensus on how this concept should be applied to women when they are pregnant.

I suspect that Eisenstein's dismissal of our ability to speak "objectively" stems from her critique of sexual objectification. Because she disfavors women's so-called objectified treatment by men, like many feminists, she discards the possibility of our ever speaking objectively in a way that does not perpetuate women's subordination.[30] What I am suggesting is that feminists do need to criticize objectification in many of the forms in which it is perpetuated, such as in the form of sexual objectification. However, our critique of objectification, like our critique of purported sameness and differences, should not lead us to dismiss the possibility of developing and building upon a universal ethical standard. In each case, we must be cautious and ensure that we have considered the complexity of women's and men's lives in making a particular claim. We may later have to revise our claim in the face of further knowledge. However, feminism needlessly abandons the possibility of developing a set of ethics for assessing the human condition when it discards entirely the possibility of speaking objectively. Rather than assert as true that we cannot speak objectively of any truths, I hope that Eisenstein and other feminists will begin to explore how it is that we know the few truths that we do know as feminists, so that we can begin to expand on this structure of knowledge.

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benefits of meditation and contemplation. *See* Colker, *supra* note 25.

29. P. 36.

30. Other feminists who more explicitly make the connection between their critique of sexual objectification and objectivity include Catharine MacKinnon and Martha Minow. *See, e.g.*, MacKinnon, *Feminism, Marxism, Method, and the State: Towards Feminist Jurisprudence*, 8 SIGNS 635 (1983); Minow, *The Supreme Court 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987).

II. Multiple Meanings Applied to the Pregnant Body and Equality

In recognizing the multiple meanings of social facts, Eisenstein's approach insists that we are affected by law while we also have the strength to resist it. For example, special treatment legislation with respect to pregnancy may reinforce stereotypes about women's "inherent weakness" and, at the same time, help women to live under more humane conditions. In addition, she would argue that the meanings of pregnancy are not created entirely by law; women can work to change the meaning and significance of being pregnant irrespective of the legal status of pregnancy.[31] She suggests that each side of the special treatment/equal treatment debate has made the mistake of not recognizing multiple meanings that can co-exist; each thinks that the only meaning the pregnant body can have is the one created by law. Eisenstein criticizes the view of the ACLU in adopting the equal treatment perspective, which insists that women who are pregnant be treated like other workers who are facing disabilities. The ACLU justifies its position by noting the harm that protective labor legislation has historically imposed on women's position in society. Eisenstein says that the ACLU is wrong to use history to reach that conclusion: Special legislation, she argues, does not "cause" women to be regarded as different. Women are regarded as different irrespective of whether legislation recognizes that fact.[32] Eisenstein says, for example, "It is true that with [special protection] legislation in place, some employers will think twice about hiring a woman, but many of them will think twice about doing so anyhow."[33] Eisenstein also criticizes the ACLU position for assuming that meaning stays the same over time. Late twentieth century discourse about women differs markedly from that of the late nineteenth century. Thus, we need to understand legislation within contemporary discourse in order to evaluate its impact on women.[34]

I think that Eisenstein is correct to suggest that we can recognize multiple meanings and therefore not find it necessary to choose transhistorical theoretical positions. Nevertheless, she overstates her position when she asserts that we can often work successfully within a combined theoretical approach (i.e., difference plus sameness) at a particular time in history. Although combined theoretical approaches may be possible on some issues, they are not successful on all issues; our task as feminists should be to make the difficult historical judgment about which theoretical approach will work best at a particular time.

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31. *See* pp. 196-200.
32. P. 204.
33. *Id.*
34. Pp. 204-05.

A. *A Case Study: Abortion*

The costs of *not* sufficiently struggling with and making important theoretical choices about important issues can be seen by examining the abortion issue. Our inability or unwillingness to engage in such a searching inquiry, and, instead, to accept an obvious "compromise" position may be extremely dangerous to women's well-being. The fact that theoretical inquiries are not possible on a transhistorical basis does not make them impossible or imprudent within a particular historical context.

Eisenstein acknowledges that radical feminists took a liberal path in the courtroom to achieve victories in the abortion context. She suggests that there is no harm in feminists choosing liberal arguments in the courtroom and radical arguments in the political arena.[35] I would argue, by contrast, that feminists made the wrong choice in picking liberal pro-choice privacy arguments rather than radical pro-women, equality arguments in litigating the abortion issue. That theoretical decision has had enormous ramifications and should have been considered more fully at the time it was made.

As Eisenstein acknowledges, the argument presented to the Court, and accepted by it in *Roe v. Wade*,[36] was a classic liberal argument for privacy. Women argued for and won the right to "choose" to have an abortion without state interference. However, the state was not required to take any steps to facilitate the broadening of the private sphere, thereby making that choice more available to all women in society. Thus, in *Harris v. McRae*,[37] the Supreme Court ruled that states need not fund abortions under Medicaid. In the Supreme Court's most recent abortion decision, *Webster v. Reproductive Health Services*,[38] the Court demonstrated further that states may do quite a bit to restrict abortion so long as they do not burden that choice with the force of the criminal laws.[39]

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35. Eisenstein recognizes that pro-choice abortion arguments have been liberal arguments, and she further recognizes that privacy arguments do not protect women's well-being without society's commitment to equality. Nevertheless, she refrains from criticizing the privacy strategy, suggesting that we can afford to use that strategy in the courts without undercutting equality arguments elsewhere. P. 188. I would suggest that the seeming success of the privacy arguments in the courts numbed feminists and prevented them from realizing how superficial those rights were. It is interesting that now that abortion seems not to be even minimally protected under privacy doctrine, feminists are showing renewed interest in the politics of abortion and equality-based argument. For example, the November 12, 1989, pro-choice march in Washington, D.C., was labelled "Mobilizing for Womens Lives."

36. 410 U.S. 113 (1973).

37. 448 U.S. 297 (1980).

38. 109 S. Ct. 3040 (1989).

39. The Supreme Court's decision this year to grant certiorari on abortion cases that do not involve criminal measures suggests that it will soon permit further restrictions on abortion. *See* Hodgson v. Minnesota, 853 F.2d 1452 (8th Cir. 1988), *cert. granted*, 58 U.S.L.W. 3046 (U.S. Aug. 1, 1989) (Nos. 88-1125 & 88-1309) (parental notification); Akron Center for Reproductive Health v. Slaby, 854 F.2d 852 (6th Cir. 1988), *cert. granted sub nom.* Ohio v. Akron Center for Reproductive Health, 58 U.S.L.W. 3045-46 (U.S. Aug. 1, 1989) (No. 88-805) (parental notification) 3045-46; Turnock v. Ragsdale, 841 F.2d 1358 (7th Cir. 1988) *cert. granted sub nom.* 58 U.S.L.W. 3045 (U.S. Aug. 1,

That result, although also criticized by many liberals, can be seen as a consequence of the use of liberal, privacy arguments in the abortion area. We gave the courts the opportunity to broaden the private sphere, thereby leaving abortion decisions a part of women's "privacy," yet permitting the state to encumber women's choices in many ways.[40] Although this result was not an *inevitable* result of the choice of the liberal, pro-choice, privacy perspective, it is certainly a result that could be attained easily under that framework. Thus, a judge as clever as Chief Justice Rehnquist did not need to overturn *Roe* in order to permit the state of Missouri to encumber abortions in *Webster* and *Harris*.

Some people might argue that we have retrenched on the abortion issue, not because of the type of argument used, but because of the change in political climate. I would certainly agree that political changes in the composition of the Court had an impact on the retrenchment that has taken place. However, I do not think we can afford to overlook the fact that our choice of doctrine has also played a role.

Justice Marshall has stood alone in recognizing that an equal protection approach is necessary for the Court to deal adequately with the abortion issue.[41] Justice Blackmun, the author of the *Roe* opinion, has never endorsed Marshall's equal protection approach. Until *Webster*, Blackmun argued that a privacy approach could invalidate the restrictions that legislatures imposed on abortions. In *Webster*, however, Justice Blackmun seemed to recognize that the privacy approach could not invalidate all measures which needlessly raise the cost of abortion and thereby make it disproportionately unavailable for poor women. One of the issues in *Webster* was the constitutionality of pre-viability testing requirements.[42] Blackmun found those requirements to be unconstitutional on a technological ground, because many of the required tests were not possible at the stage of gestation at which they were required. Nevertheless, Blackmun acknowledged that he would "see little or no conflict with *Roe*"[43] if the statute could *not* be interpreted to require inappropriate viability tests. Thus, Blackmun was unable to protect women's well-being fully under his privacy framework; he needed to rely on a technical argument to conclude that the statute was unconstitutional.

I would like to suggest that the results in *Harris* and *Webster* would have been difficult to attain if the original *Roe* decision had been couched

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1989) (No. 88-790) (regulation of clinics) (case settled).

40. For further discussion, see Fudge, *The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles*, 25 OSGOODE HALL L.J. 485 (1987).

41. *See Harris*, 448 U.S. at 341-46 (Marshall, J., dissenting).

42. The statute specified that a physician, prior to performing an abortion on any woman who he or she has reason to believe is 20 or more weeks pregnant, must ascertain whether the fetus is "viable" by performing "such medical examinations and tests as are necessary to make a finding of the [fetus'] gestational age, weight, and lung maturity." MO. REV. STAT. § 188.029 (Supp. 1989).

43. *Webster*, 109 S. Ct. at 3070 (Blackmun, J., concurring in part, dissenting in part).

in pro-women, equality terms, because the underlying justificatory scheme would have been stronger. Rather than discussing abortion as a right of privacy, it should have been discussed as an issue about the respect which society accords women. Such a framework would require us to consider abortion as a question about what responsibilities society is entitled to impose on each of us: Would a legislature that truly respected women's well-being, as seen from the perspective of women themselves, have been willing to impose these regulations on abortion?[44] That approach would be communitarian—asking about our appropriate responsibilities as members of a community—rather than individualistic. Thus, I would argue under such a perspective that society cannot encumber women's decisions to have an abortion at this time, because society does not treat women's reproductive capacity with respect. So long as society fails to provide safe and effective contraception, health insurance to pregnant women, pre- and post-natal care for women and their children, low-cost child care, and rape laws that truly ensure that sexual relations are consensual and mutual, it is not entitled to impose upon women the burden of bringing a fetus to term. Abortion regulations, under such a framework, are problematic not because we want women to be protected in their privacy but because we want society to create an environment in which women are treated with community-based respect.[45]

Under this latter approach, I would argue that *Harris v. McRae* could not have come out the way it did. The plaintiffs in *Harris* understood this fact and made a strong equality argument, which the Court rejected.[46] Similarly, in *Webster*, women of color and juvenile women filed briefs in which they argued that the cost of abortions had a disparate impact on poor, young women and that they were the group most likely to delay having abortions.[47] Therefore, these women would disproportionately incur the added expense of unnecessary viability tests. Because a major reason that poor, young women delayed having abortions was their inability to obtain the necessary funds, this cost-raising measure could be expected to have a substantial impact on their already strained ability to procure an abortion. Thus, instead of talking about privacy doctrine, these women

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44. Elsewhere, I have called this approach "equality as compassion." *See* Colker, *supra* note 25. An important aspect of this approach is that we act in a respectful manner toward others—considering their well-being from their perspective. Simone Weil's work has considerably influenced this approach. Weil spent her life trying to treat others from such a perspective. *See* Teuber, *Simone Weil: Equality as Compassion*, 43 PHIL. & PHENOMENOLOGICAL RES. 221, 235-36 (1982).

45. I discuss this approach more fully in Colker, *supra* note 25.

46. The plaintiffs in *Harris v. McRae* made a class-based equality argument concerning the impact of the statute on the lives of poor women. The same argument could be made in sex-based terms, focusing on the impact on women, particularly poor women.

47. *See* Brief *Amici Curiae* of the National Council of Negro Women, Inc. *et al.* in Support of Appellees at 695-98, *Webster* (No. 88-605); Brief of *Amici Curiae* American Public Health Association, *et al.* in Support of Appellees at 22-23, *Webster* (No. 88-605).

talked about how the regulations at issue in *Webster* jeopardized their lives and health.[48]

Some people might respond that the problem with my suggested approach is that it does not provide women with an absolute right to choose an abortion under any historical circumstances. If society treated women and their reproductive capacity with respect, then the state might be able to justify certain restrictions on abortion (not including the use of the criminal law which would be inherently disrespectful). I do not find that result troubling because the restrictions would have to be respectful of women's well-being. If the restrictions were not respectful, they would be unconstitutional.

For example, I could imagine that in a society that respects women's well-being, the legislature might decide to require women who seek abortions to undergo pre- and post-abortion counselling in order to respond to the possibility of post-abortion emotional trauma. Under the privacy approach, feminists might oppose such regulations because they threaten the privacy of women's abortion decisions. Under an equality approach, such regulations could be constitutional if they served women's well-being. The equality approach would recognize that states can sometimes interfere in women's lives to protect their well-being.

We are fooling ourselves if we think that using the privacy approach makes abortion absolutely available to women. It does not. It makes abortion available to privileged women, who can afford the high price that society insists they pay for it. Other women will experience unwanted childbirths or illegal abortions, which are cheaper but endanger their health. I find the equality approach much more satisfying. The "right" that it creates is created for all women, not simply for privileged women who can afford the purchase price of privacy.

The abortion issue is therefore an example where the choice of perspectives—liberal privacy theory rather than radical group-based theory—is a distinction with a difference. Eisenstein is wrong to suggest that we can choose one strategy in the court room—liberalism—and another strategy in the streets—equality. Our perspective in the courtroom affects our strategies in the streets.

Thus, feminists need to be more diligent in ensuring that we are making effective legal arguments on particular issues that will really serve women's well-being. I have no problem with pragmatism. I can imagine

48. *See, e.g.*, Brief *Amici Curiae* of the National Council of Negro Women, Inc. *et al.* in Support of Appellees, *Webster* (No. 88-605). Essentially, they argued that making abortion illegal or restricting abortion simply raises the cost of having an abortion. For poor women, abortion restrictions cause them to: (1) delay having an abortion until they have the necessary financial resources, often causing them to have a second trimester rather than a first trimester abortion; (2) forego having an abortion and undergo the enormous costs of unwanted childbirth; or (3) have an illegal abortion that is cheaper but poses substantial health risks. None of these options protects the lives of women who face unwanted pregnancies and are often poor and young.

us concluding after a searching inquiry that the more "liberal" sameness approach is appropriate in the pregnancy context and that the more "radical" equality approach is appropriate in the abortion context. No matter which choice we make, however, we must think through its full practical consequences.

B. *Some Helpful Insights*

Despite these criticisms, I found Eisenstein's work very helpful in contributing to my understanding of how to describe in legal terms why pregnancy-based legislation constitutes sex discrimination. Eisenstein emphasizes the importance of thinking of the body as a capacity, not a static entity, and a capacity that has multiple meanings. In the pregnancy context, the Supreme Court has concluded that pregnancy-based legislation is not sex-based legislation because both women and men can be non-pregnant persons.[49] Eisenstein criticizes this result, using a familiar feminist line that the Court's error is its use of the male norm in defining what constitutes sex-based inequality.[50]

Although Eisenstein's criticism is appropriate, I think that her perspective suggests an even stronger criticism. The category of non-pregnant persons does include both women and men; however, the Court's error was in not recognizing that women and men are not similarly situated in their non-pregnant status. Nearly all women are affected by pregnancy-based discrimination irrespective of whether they are pregnant, because nearly all women have the capacity to become pregnant. For example, if a state does not provide mandatory pregnancy leave, then a woman may choose to defer or avoid childbirth because childbirth is not feasible for her without the guarantee of pregnancy leave. A man, however, cannot become pregnant and is not affected by the presence or absence of maternity leave in the same way. Pregnancy disability leave is never available to him since he does not face disabilities when his wife or lover becomes pregnant. Admittedly, the inconvenience to his female partner of becoming pregnant may influence his decision whether to agree to a childbearing decision; however, I would suggest that childbearing decisions are not as significant in most men's lives as in most women's lives. Thus, the meaning of being non-pregnant is not the same for women and men due to the interaction between biology and culture. For women, the California disability policy at issue in *Geduldig*[51] impacts them in a sex-specific way irrespective of whether they are or are not pregnant. The Court's error under Eisenstein's theory, then, is failing to examine the comparability

49. Geduldig v. Aiello, 417 U.S. 484, 497 n.20 (1974).
50. Pp. 66-67.
51. 417 U.S. 484 (1974).

between women and men who are not pregnant. It did not explore the multiple meanings of the non-pregnant person.

In sum, Eisenstein's work does not make it easier for me to contemplate how to combat sex-based inequalities relating to women's reproductive status. I still may face difficult pragmatic choices between the special treatment and equal treatment approaches. However, her work does provide me with fresh insight into how I need to examine closely both sides of the equality equation—both the side that is supposed to represent difference as well as the side that is supposed to represent sameness—to see whether a purported sameness is one when we use a theory of meaning that recognizes multiple and changing truths.

III. Towards a Feminist Theory of Jurisprudence

Legal argumentation requires us to claim that we are right and our opponent is wrong. Moreover, it has been commonplace for feminists to ask the courts to dictate to the legislature the parameters of what they can do constitutionally. This is often called judicial activism. But how do feminists attain confidence necessary to make such claims, given the feminist critique of consciousness? In order to say that we are right and our opponent is wrong and that, moreover, the courts should dictate right answers to the legislature, it would seem that feminist theory would have to be quite confident of its ability to know the truth.

I would like to suggest, based on Eisenstein's work, that feminists need to learn to make legal arguments in a way that is more sensitive to feminist understandings of truth. Specifically, feminists need to show that they are open to multiple meanings and are open to the possibility that they may be wrong when they make legal arguments. On the other hand, feminists should also learn from their practice that they do believe in some truths. Both openness and an articulation of truth are necessary.

Let me again return to the abortion issue as an example. I have suggested above that the appropriate way, from a radical feminist perspective, to think about the abortion issue is in a communitarian, group-based way. I have said that we should think about whether society has sufficiently demonstrated its respect for women's well-being in the manner in which it restricts abortion. And I have said that I have no problem concluding that society, as presently constituted, does not sufficiently respect women's well-being when it tries to restrict abortion.

Nevertheless, I must recognize that abortion presents multiple meanings, some of which are troubling. Quite simply, as a radical feminist, I believe it is important to value life. Thus, I, like many radical feminists, oppose capital punishment and am both a pacifist and a vegetarian. Given that concern for life, the abortion issue is a very difficult one. Although it is necessary to protect women's lives and well-being by permitting abor-

tion, it is also unfortunate that society's disrespect for women must cause the termination of fetal life. The way I think through the abortion issue reflects an openness to the many meanings and values that are present in the abortion controversy. I oppose state regulation of abortion, yet try to maintain an openness on that issue in the event that I have not appropriately considered how the prevalence of abortion may harm the fabric of society.

If feminists were true to Eisenstein's call for openness, I think that feminists would have to talk about abortion in more tentative language, similar to what I have used above. But if you read the briefs filed in abortion cases or the many articles written on the subject by pro-choice feminists, you will not find that openness.[52] You rarely, if ever, find a feminist who will even acknowledge that pro-life advocates are right to encourage us to make sure we value life dearly.[53] And when I have tried to acknowledge my own openness to the values expressed by pro-life advocates, I have sometimes been told that I am not a "real feminist."

In sum, I wonder if the nature of legal argumentation—which requires us to argue about difficult issues in black and white terms—has caused us, as feminists, to lose the openness to competing views that Eisenstein says is essential to feminist theory. Even if feminists find that they cannot change the way they talk to courts, I hope that we begin to re-examine how we talk to each other. I hope that feminist theory moves in the direction of openness rather than dogmatism.

IV. Conclusion

In this essay, I have suggested that we can try to speak the truth to courts but that we need to do so in a radical voice that also recognizes the multiple and open meanings contained in truth. Zillah Eisenstein has assisted me in trying to address this concern; I encourage others to read her book and engage in open dialogue.

52. Eisenstein's work does not reflect openness when she discusses abortion, because she never recognizes the plausibility of wanting to protect the valuation of life. She discusses abortion as if women's well-being is all that is at stake. Pp. 184–85.

53. An exception would be writings by Buddhist feminists in which they favor women's right to choose an abortion but acknowledge that women should undergo a grieving process when they do choose an abortion. *See, e.g.*, Klein, *Buddhist Views on Abortion*, 6 Spring Wind-Buddhist Cultural F. 166, 170–71 (1986) (special issue on women and Buddhism).